certified by the clerk to be a true transcript of the record but containing nothing to identify its contents as the evidence adduced on the trial, and no indorsement or other earmark of the judge to indicate that he had seen it or approved it as a true transcript of the evidence, cannot be made a part of the record.

4. Appeal—Writ of Error—Questions Presented for Review—Necessity for Setting Forth Evidence.—Whether the trial court committed prejudicial error in calling a witness in a civil case of its own motion cannot be considered, where the evidence given by the witness is not before the court.

SCOTT *v.* CHICHESTER, Sergeant.

Jan. 23, 1908.

[60 S. E. 95.]

Criminal Law—Punishment—Term of Imprisonment—Inclusion of Time of Parole.—Where a prisoner who had been paroled on good behavior thereafter defaulted and was remanded to jail, he was entitled to be discharged on expiration of the period of his sentence, counting the time during which he was on parole, and he could not be held for the period of his sentence, not counting the time while on parole.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 15, Criminal Law, § 3313.]

NORFOLK & W. RY. CO. *v.* DUKE & RUDACILLE.

Jan. 23, 1908.

[60 S. E. 96.]

1. Appeal and Error—Judgment—Conclusiveness.—A judgment of the Supreme Court of Appeals remanding a cause for new trial necessarily determined that the circuit court had jurisdiction, and concludes the raising of such question subsequently, since a decision of the Supreme Court of Appeals settles the question of jurisdiction, and that and all other matters determined becomes res judicata with the finality of such judgment or decree, where the question raised upon second appeal or writ of error was necessarily involved on the former appeal or writ of error, whether actually adjudicated or not.

2. Same.—A decision of the Supreme Court of Appeals on a former writ of error, approving an instruction in effect construing a contract to be severable, concludes an objection on a subsequent trial to the refusal of an instruction that the contract was entire.

3. Same.—A decision of the Supreme Court of Appeals on a former writ of error, approving an instruction that in determining what constituted a reasonable time for the delivery of railroad ties

under a contract the jury could consider the conduct of the parties subsequent to the contract, concludes an objection on a subsequent trial to testimony tending to show the contractor's efforts to purchase tracts of timber.

4. Contracts—Action for Breach—Evidence—Admissibility.—Where a contract for the sale of railroad ties did not specify the time within which they were to be delivered, the law implied that they were to be delivered within a reasonable time, and in determining what was a reasonable time the contractors could show their difficulty in securing labor after the contract was made; they having drawn the other party's attention to the scarcity of labor when the contract was made.

5. Same—Instructions—Refusal—Propriety.—In an action against a railway company for breach of a contract to purchase railroad ties, it was proper to refuse to instruct that neither the scarcity of nor inability to get hands or timber could excuse plaintiffs from performing their contract in a reasonable time, since the instruction was incomplete in not further stating that, while those facts did not excuse plaintiffs' performance in a reasonable time, they were to be considered by the jury in determining what was a reasonable time in which to perform.

THURMAN *v.* COMMONWEALTH.

Jan. 23, 1908.

[60 S. E. 99.]

1. Jury—Summoning—Writ of Venire Facias—Sufficiency.—Code 1887, § 4018 [Va. Code 1904, p. 2114], provides that the writ of venire facias in case of felony shall command the officer to whom it is directed to summon 16 persons "of his county or corporation," to be taken from a list furnished him by the clerk issuing the writ, and that such list shall contain the names of 20 persons drawn for that purpose by the clerk from the names and box provided for by Code 1887, §§ 3142, 3144 [Va. Code 1904, p. 1661]. Under section 3142 only the names of inhabitants of the county or corporation where the trial court is held can be placed in the box. Held that, where the writ required the officer to summon "16 persons from the list attached," which was the list required to be drawn from the box provided for by sections 3142 and 3144, it was sufficient, though the words "of his corporation" were omitted, since the writ with the list attached constituted the writ of venire, and the two were to be read together.

2. Criminal Law—Appeal—Presumptions—Summoning Jury.—Code 1887, § 4018 [Va. Code 1904, p. 2114], provides that the writ of venire facias in case of felony shall command the officer to summon 16 persons, etc., to attend the court "on the first day of the next tern